The Honorable Ronald B. Leighton

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

COALVIEW CENTRALIA, LLC, a Delaware limited liability company, Plaintiff, v. TRANSALTA CENTRALIA MINING LLC, a Washington limited liability company, and TRANSALTA CORPORATION, a Canadian corporation, Defendants.	NO. 3:18-CV-05639-RBL **TRANSALTA CENTRALIA MINING LLC'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT** NOTE ON MOTION CALENDAR: AUGUST 2, 2019 ORAL ARGUMENT REQUESTED

SAVITT BRUCE & WILLEY LLP
1425 Fourth Avenue Suite 800
Seattle, Washington 98101-2272
(206) 749-0500

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SAVITT BRUCE & WILLEY LLP
1425 Fourth Avenue Suite 800
Seattle, Washington 98101-2272
(206) 749-0500

I. INTRODUCTION

Plaintiff's Motion for Summary Judgment (the "Motion") asks the Court to interpret the Master Services Agreement ("MSA")[1] so as to erect a time-bar to any claim for any breach by Coalview that results in overbilling not discovered within 30 days. Coalview's interpretation is contrary to New York law, would render other provisions of the MSA and the parties' other agreements superfluous or nonsensical, and is at odds with the parties' own prior conduct.

New York law requires that any contractual limitation of actions must expressly, clearly, and unambiguously state that it bars "claims," "actions," "suits," or the like. Article 7.04 of the MSA does no such thing. Moreover, reading such a limitation into Article 7.04 would make other dispute-resolution provisions in the parties' agreements meaningless. For these reasons, the Court should rule that, as a matter of law, the MSA does *not* bar TransAlta's claims in this case.

Even if Article 7.04 were ambiguous, however, ambiguities are strictly construed against the party seeking to impose a limitation of actions. Moreover, the extrinsic evidence shows that, in prior invoice disputes regarding invoices more than 30 days old, Coalview never claimed that MSA Article 7.04 barred TransAlta's objections. Rather, both parties recognized that the dispute-resolution provisions in Article 12 applied, not Article 7.04. At the very least, this extrinsic evidence of intent makes resolving any ambiguity an issue of material fact precluding summary judgment in Coalview's favor.

Coalview's motion to dispose of TransAlta's good-faith and fair-dealing claim is premised on Coalview's own erroneous characterization of the claim as entirely duplicative of TransAlta's contract claims. But the characterization is false. Coalview's breach of contract can be established based on its failure to use industry best practices so as to accurately measure the coal removed from Pond 3C. But the agreements lack detail regarding the means and process for measurement. Implicit in them, however, is the understanding that Coalview would

[1] Each of the agreements cited in this brief is attached as an exhibit to Coalview's Motion for Summary Judgment, ECF No. 157.

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1425 Fourth Avenue Suite 800
Seattle, Washington 98101-2272
(206) 749-0500

not intentionally fail to calibrate or tamper with the meters or take density readings so as to skew the results; while not expressly prohibited in the parties' agreements, such actions would constitute bad faith.

As for Coalview's motion to dispose of TransAlta's fraud claim, the Court has already ruled on the issue—twice. As it did in opposing TransAlta's motion for leave to amend to add the fraud claim, and again in moving for dismissal of the fraud claim the Court had just allowed TransAlta to add, Coalview once again argues that, under New York law, a party cannot claim fraud based on the conduct giving rise to a claim for breach of contract. This argument is premised on New York's independent-duty doctrine. But as TransAlta has now twice argued and Coalview has yet to rebut, New York law does not apply to TransAlta's fraud claim, and Washington's independent duty doctrine allows it.

For all of these reasons, the Court should enter summary judgment that MSA Article 7.04 does not preclude TransAlta's claims in this case and otherwise deny Coalview's motion for summary judgment.

II. STATEMENT OF FACTS

Coalview's motion is predicated on an interpretation of the MSA that is contradicted by Coalview's prior conduct in a 2016 dispute between the parties concerning invoices much more than 30 days old. At no time during this dispute did Coalview invoke Article 7.04 as a bar to TransAlta's objections. Part II.A addresses these facts.

In addition, Coalview argues that TransAlta's reliance on its misrepresentations was not reasonable because TransAlta could have monitored Coalview's work. But even if "you should have known better than to believe me" were a valid defense to fraud in Washington, the fact is that TransAlta has monitored Coalview's work and taken numerous other steps to try to ensure the accuracy of its measurements. Part II.B addresses these facts.

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1425 Fourth Avenue Suite 800
Seattle, Washington 98101-2272
(206) 749-0500

A. Prior Dispute over Invoices More than 30 Days Old

Coalview has insisted throughout this litigation that MSA Article 7.04 serves as a limitation of actions, barring TransAlta from disputing any invoice more than 30 days after it is issued. But Coalview's own prior conduct and admissions contradict this interpretation.

In September of 2015, approximately 10 months after extraction of Waste-Coal Slurry ("WCS") from Pond 3C began, Ken Johnson and Roger Fish met to discuss discrepancies in Coalview's invoices—specifically, the tonnage reported removed by Coalview did not square with TransAlta's own measurement and analysis of the work done, and TransAlta wanted an explanation. (Decl. Ken Johnson Opp. Mot. Summ. J. ("Johnson Decl.") ¶ 11.) At this meeting, TransAlta raised issues with invoices dating all the way back to December 2014, and continuing through the then-present invoices for September 2015. (*Id.*) Specifically, TransAlta alleged that Coalview had miscalculated the dry tonnage of the WCS it removed and had only actually removed 62.7% of the WCS for which it had invoiced TransAlta, resulting in a $3.4 million overpayment to Coalview. (*Id.* ¶¶ 8–10.)

At the September 2015 meeting, Mr. Fish acknowledged the discrepancy, acknowledged that it was a serious problem, and indicated Coalview's intent to correct it. (*Id.* ¶ 11.) Following the meeting, Mr. Fish confirmed that the error had been caused by improper conversion of Coalview's raw-measurement data into dry tonnage of WCS.[2]

By June of 2016, however, Coalview had not repaid TransAlta. (*Id.* ¶ 13.) Thus, on June 2, 2016, TransAlta served Coalview with a demand letter formally stating the nature of the problem and the period of the overbilling (December 2014 to September 2015), directing Coalview to reduce all future invoices by 10% until the overpayment was recouped. (*Id.* Ex. B.)

[2] Coalview later characterized the error as having occurred because: "[t]he PLC calculation and totalization of dry tons processed appears to have been incorrectly programmed by CVC's construction contractor resulting in an overpayment for waste coal slurry by TCM to CVC." (*Id.* Ex. D, at 1.)

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1425 Fourth Avenue Suite 800
Seattle, Washington 98101-2272
(206) 749-0500

Coalview responded to this demand by requesting that TransAlta take an equity stake in Coalview as satisfaction of the acknowledged overpayment obligation.[3] (*Id.* Ex. D.) TransAlta refused this offer in a letter dated July 5, 2016 and again asked that Coalview adjust down all future invoices as requested in the June 2 letter. (*Id.* Ex. E.)

Tellingly, Coalview's response was not to invoke Article 7.04 of the MSA, which Coalview now contends bars any dispute over invoices more than 30 days old. Rather, Coalview requested an opportunity to verify the tonnage claim through an independent party. (*Id.* Ex. F.) In further correspondence, Coalview emphasized that it was operating at a loss and at risk of insolvency and suggested a 7-year graduated repayment plan that would have made TransAlta whole by 2022. (*Id.* Ex. G.) Coalview then invoked ***Article 12*** of the MSA—the MSA's dispute-resolution section—to suggest that, if TransAlta did not approve of the proposed repayment plan, Coalview would move the dispute to binding arbitration. (*Id.*)

The arbitration never took place. Instead, the parties continued to negotiate. On September 30, 2016, TransAlta declared Coalview in default and notified Coalview that it would exercise its right of setoff as provided in MSA Article 7.03 to unilaterally withhold payment of Coalview's invoices until the overpayment was recouped, beginning with Coalview's October 16, 2016 invoice. (*Id.* Ex. I.) TransAlta began withholding payment in October, as promised.

Again, rather than invoking MSA Article 7.04 and taking the position that TransAlta was not within its rights to withhold payment because it had not disputed the invoices within 30 days, counsel for Coalview conceded the overpayment amount and agreed to TransAlta's offset. (*Id.* Ex. J.) Coalview's counsel suggested, however, that TransAlta set off only half the overpayment amount, and offered that Coalview would pay the other half in a lump sum prior to October 31, 2016. (*Id.*)

[3] In this proposal, Coalview states that "CVC concurs that CVC is obligated to provide TCM reimbursement of a mutually agreed upon amount, which TCM currently believes is approximately $3.5 million." *Id.* Coalview later confirmed that, based on its own calculations, Coalview had been overpaid by $3,429,280.72. (*Id.* Ex. H, at 8.)

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Seattle, Washington 98101-2272
(206) 749-0500

Coalview never made the lump-sum payment. On November 1, 2016 TransAlta therefore notified Coalview and the bondholders that Coalview was still in default under the MSA and informed Coalview that, if it did not cure its default within 90 days, the MSA and related agreements would be automatically terminated. (*Id.* Ex. K.) In the meantime, TransAlta continued to set off Coalview's invoices, eventually recouping the full $3.4 million (and curing Coalview's default) in December 2016. (*Id.* ¶ 27.)

At no time did the parties enter into a formal settlement agreement or release of claims. Instead, the dispute—a dispute over invoices then between one and two years old—was resolved informally, without recourse to either litigation or arbitration. And, at no time during this dispute did Coalview ever suggest that MSA 7.04 applied to TransAlta's claim. (*Id.* ¶ 28)

B. Subsequent Operations and Origin of 2018 Dispute

Following this dispute, TransAlta continued to work with Coalview to improve the yield and productivity of their reclamation operation. This included efforts to ensure that Coalview's measurement data was accurate. Thus, in December 2016, TransAlta purchased for Coalview a pair of Ronan nuclear density meters. (Johnson Decl. ¶ 30.) These meters came online in May 2017 and provided input data for Coalview's corrected calculation methodology through the outset of this lawsuit. (*Id.*) It was not until April of 2018 that TransAlta learned that Coalview had tampered with the Ronan meters, had willfully miscalibrated the Ronan meters, and had fabricated Marcy scale measurements. (*Id.* ¶ 32.) These realizations indicated that Coalview's tonnage calculations were now being made on bad input data, again raising concerns about the validity of its invoices, and precipitating the present dispute. (*Id.* ¶ 33.)

SAVITT BRUCE & WILLEY LLP
1425 Fourth Avenue Suite 800
Seattle, Washington 98101-2272
(206) 749-0500

III. ARGUMENT

A. The Court Should Deny Coalview's Motion for Summary Judgment on TransAlta's Contract Claims

To create the limitation of actions that Coalview claims it does,[4] MSA Article 7.04 would have to clearly and unambiguously state that the failure to object to invoices precludes subsequent legal action. It does not, and nor would such an interpretation comport with the other provisions in the parties' agreements. For this reason, the Court should hold as a matter of law that Article 7.04 does not bar TransAlta's claims, as discussed in part III.A.1 below. In the alternative, as discussed in part III.A.2, Article 7.04 is ambiguous in this regard, in which case genuine issues of material fact preclude summary judgment in Coalview's favor. Part III.A.3 argues that Coalview is precluded from asserting that an objection within 30 days is a prerequisite to filing suit, because its own wrongful conduct prevented TransAlta from raising such an objection. And finally, part III.A.4 makes clear that TransAlta's contract claim is not a pure invoice dispute within the meaning of MSA Article 7.04 in any event: Coalview's breaches concern the data collection; while the inaccurate data translated into inflated invoices, the invoices themselves are not the issue.

None of these issues was the focus of Coalview's initial motion for a preliminary injunction or the Court's preliminary injunction order. There, the issue was whether TransAlta could withhold payments as an offset and the nature of the harm if it did, in light of the eventual likelihood of success on the merits. The parties did not brief the issue of whether, as a matter of law, Article 7.04 created an enforceable limitation of actions, and thus the Court has not decided this issue, as Coalview argues.

[4] Coalview's prior briefing argues that MSA Article 7.04 is not a limitation of actions clause subject to the *Hurlbut* standard because it does not limit the time to *sue*, merely the time to *initiate a dispute*, which might lead to litigation in the future. (*See* ECF No. 138, at 10–11.) Thus Coalview claims that all MSA Article 7.04 does is limit the *subject matter* of a dispute, not the time to bring suit. But this is a distinction without a difference. Semantics aside, Coalview's position is that MSA Article 7.04 effectively bars TransAlta from ever bringing suit over any invoice it did not dispute within 30 days.

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1425 Fourth Avenue Suite 800
Seattle, Washington 98101-2272
(206) 749-0500

1. As a matter of law, MSA Article 7.04 is not a limitation of actions

a. Under New York law, the language of MSA Article 7.04 itself does not create a limitation of actions

Under well-settled New York law, for a contract to limit the time in which a party may pursue legal action for breach, it must do so clearly and unambiguously. *Hurlbut v. Christiano*, 405 N.Y.S.2d 871, 873 (1978). In *Hurlbut*, for example, the plaintiff sued for a breach of a contract for the sale of a nursing home. The parties' contract represented, among other things, that the nursing home was not operating in violation of New York health care regulations. Under the contract, this representation survived for only three years. After a protracted effort to resolve approximately 42 violations of the New York State Hospital Code, the plaintiff sued defendant—four years after the execution of the contract.

Like Coalview here, the defendant in *Hurlbut* argued that the plaintiff's claim was time-barred: any dispute regarding the defendant's representations about nursing home's regulatory compliance should have been initiated within the three-year period. *Id.* at 872. The New York Court of Appeals rejected the argument, because the contract did not contain language indicating that there was a time limit for parties to ***litigate*** a dispute arising out of the contract. *Id.* at 873. Thus, the agreement was clear and unambiguous that it ***not*** create a limitation of actions, and the plaintiff's suit was not time-barred. *Id.*

Similarly, in *Fitzpatrick & Weller, Inc. v. Miller*, 765 N.Y.S.2d 555, 556 (2003), the plaintiff sued following delivery of a shipment of lumber that did not meet the standards promised by the defendant. The defendant moved for summary judgment, pointing to a provision in the parties' contract that allegedly required plaintiff to dispute the defendant's invoices within 14 days, arguing—just as Coalview does here—that this clause served as a time bar to the plaintiff's claims. *Id.* Specifically, the contract required that "the buyer [] report any difference between the amount of the seller's invoice and the value of the shipment computed from the buyer's measurement and inspection within 14 days after [delivery]." *Id.* The trial court denied the motion, and the Appellate Division affirmed; citing *Hurlbut*, the court noted

SAVITT BRUCE & WILLEY LLP
1425 Fourth Avenue Suite 800
Seattle, Washington 98101-2272
(206) 749-0500

that there was nothing in the language of the contract from which a limited time to sue over an invoice could be inferred. *Id.*

By contrast, in *Wechsler v. HSBC Bank USA, N.A.*, 674 Fed. Appx. 73, 75 (2d Cir. 2017) (applying New York law), the contract expressly provided that "legal action" must be commenced within one year of an alleged breach. Accordingly, the court held the contract created an unambiguous limitation of actions. *Id.*; *see also Backus v. Nationwide Mut. Ins. Co.*, 392 N.Y.S.2d 765, 766 (1977) (affirming dismissal where contract provided that "no such action shall be brought at all" if not brought within a certain time); *Elliott-McGowan Prods. v. Republic Prods., Inc.*, 145 F. Supp. 48, 49 (S.D.N.Y. 1956) (granting summary judgment dismissing claim for breach where contract provided that "claim or demand shall have been asserted and such action, suit or proceeding shall have been commenced within two years").

Here, Article 7.04 of the MSA says nothing about claims, actions, suits, litigation, or anything of the sort. Rather, it provides a process for resolving invoice disputes requiring that "written notice of the [dispute] . . . must be given to the other Party prior to [30 days]," and the undisputed portion of the invoice must be paid.[5] As in *Hurlbut* and *Fitzpatrick & Weller, Inc.*, such language does not clearly and unambiguously create a time-bar for legal actions and thus—as a matter of law—does not preclude TransAlta's from bringing suit on claims for damages based on invoices not objected to within 30 days.

Indeed, this case is more compelling than *Hurlbut* or *Fitzpatrick & Weller, Inc.,* because the MSA expressly provides for non-waiver of rights not expressly waived. In Article 7.05—immediately following Article 7.04—the MSA states that "[each party] reserves to itself [all rights] not expressly disclaimed or waived herein." As Article 7.04 contains no express waiver, Article 7.05 says that it cannot serve to limit TransAlta's right to bring this suit. Thus, the parties' own contract says what New York law says about a contractual limitation of actions: if not expressly and clearly stated, there is no such limitation.

[5] *See* ECF No. 157, Ex. A.

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TransAlta agrees that there is no issue of material fact here; the Court should enter summary judgment in favor of TransAlta that MSA Article 7.04 does not bar TransAlta's claims in this case.

b. Taken in the context of the parties' agreements as a whole, MSA 7.04 does not create a limitation of actions

New York law requires that courts interpreting contracts give "effect and meaning . . . to every term of [a] contract" and strive "to harmonize all of its terms." *India.Com, Inc. v. Dalal*, 412 F.3d 315, 323 (2d Cir. 2005). Interpretations "that render provisions of a contract superfluous" are particularly disfavored. *Int'l Multifoods Corp. v. Commercial Union Ins. Co.*, 309 F.3d 76, 86 (2d Cir. 2002). TransAlta's interpretation of the contract displays this consistency, whereas Coalview's interpretation conflicts with or renders superfluous the parties' agreements in several respects.

First, TransAlta's interpretation is consistent with the terms of Article 7.04 itself. The plain language of the article provides that, after receiving an invoice, TransAlta can dispute it within 30 days. It follows that, to dispute an invoice, there must be something evident on the face of the invoice to dispute. After making such a dispute, Article 7.04 provides that TransAlta shall pay the undisputed portion, and the parties will determine the validity of the disputed portion and adjust the invoice as needed. Thus, the MSA contemplates that, in a dispute, the invoice shall be divisible into disputed and undisputed portions—again based on the face of the invoice. As discussed above, nowhere does Article 7.04 say that TransAlta loses the right to sue after 30 days elapse.

Second, TransAlta's interpretation is consistent with Article 12, entitled "Dispute Resolution." Article 12 applies to "***[a]ny dispute, controversy, or claim***" arising out of the project agreements. (Emphasis added.) This article provides detailed guidance on the parties' legal remedies, setting forth options for both arbitration and litigation of disputes. Though it generally requires binding arbitration to resolve disputes, Article 12.03(h) provides that, for disputes over $1 million, a party may bring a lawsuit without first submitting to arbitration.

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(206) 749-0500

Nothing in Article 12 purports to limit the time to bring a suit, and nothing in Article 12 purports to limit the time period that may be the subject of a suit. If the parties had intended a hard 30-day limit on all claims relating to invoice amounts, surely the parties would have included such language in the section of the MSA governing dispute resolution, but they did not.

Third, the parties' other agreements also support TransAlta's interpretation. Article 5.05 of the Exclusive Waste Coal Slurry Recovery and Processing Agreement ("Processing Agreement")[6] states that, "[i]n the event a dispute arises between [the parties] within forty-five [days] of the date of the weighing, due to a difference between [the parties'] calculation of the quantity of WCS that was withdrawn for Processing, either Party may retain an independent expert … to ascertain the accuracy of [Coalview's] density and flow equipment and to recalculate the Tonnage of WCS." Because invoices cover a semi-monthly period and are issued immediately upon the end of each period (*see* ECF No. 4, Ex. J, invoice for June 1–15, 2018, issued June 16, 2018), Article 5.05 of the Processing Agreement would allow TransAlta to dispute a measurement reflected in an invoice more than 30 days after the invoice date. Under Coalview's interpretation, this provision would be superfluous because it allows for a "dispute . . . due to a difference [in tonnage calculations]" after Coalview's alleged 30-day window. Article 5.02 of the Exclusive Coal Tendering Agreement[7] contains similar language, also permitting independent verification of tonnage after more than 30 days.

2. To the extent that MSA Article 7.04 is ambiguous, it must be construed against Coalview

In a contract dispute, a motion for summary judgment may be granted only where the agreement's language is unambiguous and conveys a definite meaning. *Sayers v. Rochester Tel. Corp. Supplemental Mgmt. Pension Plan*, 7 F.3d 1091, 1094 (2d Cir. 1993). Contract language is ambiguous if it is "capable of more than one meaning when viewed objectively by

[6] *See* ECF No. 157, Ex. B.

[7] *See* ECF No. 157, Ex. C.

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(206) 749-0500

a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." *Walk–In Medical Centers, Inc. v. Breuer Capital Corp.*, 818 F.2d 260, 263 (2d Cir. 1987). Put more simply, a contract is ambiguous if it is subject to two or more reasonable interpretations.

As discussed in part III.A.1.b above, TransAlta's interpretation of MSA 7.04 is reasonable in that it provides a process and rules regarding invoice disputes—i.e., disputes about the proper amount of a particular invoice, apparent from the face of the invoice. It is also reasonable when considered within the larger context of the parties' contracts.

Thus, even if Coalview's interpretation of MSA Article 7.04 were reasonable, at best this would create an ambiguity in the contract. And where a party claims that a contractual provision sets a limitations period for legal actions, any such ambiguity must be strictly construed against the party asserting the limitation. *Hurlbut*, 405 N.Y.S.2d at 873; *Fitzpatrick & Weller, Inc*, 765 N.Y.S.2d at 556. On the basis of this strict construction alone, the Court should deny Coalview's motion and grant summary judgment in TransAlta's favor that MSA Article 7.04 does bar TransAlta's claims.

Even without the benefit of a strict-construction rule, however, the parties' conduct provides further support for TransAlta's interpretation that MSA Article 7.04 does not bar its claims. In 2016, TransAlta notified Coalview that it intended to exercise its right of setoff to recoup the overpayment of invoices that, at the time the dispute was initiated, were between 9 and 18 months old. TransAlta initiated this dispute under the terms of the MSA, which expressly allow for such setoffs. (*See* MSA Art. 7.03.) Rather than invoking MSA Article 7.04 and claiming that TransAlta was barred from disputing any invoice more than 30 days old under any circumstances, Coalview responded by recognizing TransAlta's ability to set off invoices and suggesting that—if it came to a formal dispute—Article 12 provided the appropriate mechanisms for resolution. At no point did Coalview take the position that MSA Article 7.04 somehow barred TransAlta's claims.

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Seattle, Washington 98101-2272
(206) 749-0500

Thus, even if the Court does not grant summary judgment in TransAlta's favor on this issue, it must deny Coalview's motion. Where a contract is ambiguous and "there is relevant extrinsic evidence of the parties' actual intent," then the contract's meaning becomes an issue of fact precluding summary judgment. *Sayers v. Rochester Tel. Corp. Supplemental Mgmt. Pension Plan*, 7 F.3d 1091, 1094 (2d Cir. 1993). Moreover, in resolving a summary judgment motion, a court must resolve all ambiguities against the movant. *Brod v. Omya, Inc.*, 653 F.3d 156, 164 (2d Cir. 2011). Given the parties' prior course of performance, and drawing all reasonable inferences in the light most favorable to TransAlta, there are at least genuine issues of material fact as to the interpretation of MSA Article 7.04 that preclude summary judgment in Coalview's favor.

3. Coalview's bad-faith actions deprived TransAlta of its ability to object to invoices in a timely fashion

Coalview's position is that TransAlta must dispute any invoice within 30 days or forever lose the right to claim overpayment. Under this interpretation, if MSA Article 7.04 does not create a time-bar, then it creates a condition precedent. *See Ferguson v. Lion Holding, Inc.*, 478 F. Supp. 2d 455, 467 (S.D.N.Y. 2007) (treating contractual period requiring plaintiff to object to defendant's conduct within set time period as condition precedent). But "[a] party to a contract cannot rely on the failure of another to perform a condition precedent where he has frustrated or prevented the occurrence of the condition." *Kooleraire Serv. & Installation Corp. v. Bd. of Educ. of the City of N.Y.*, 28 N.Y.2d 101, 106–07 (1971). Accordingly, "one who unjustly prevents the performance or the happening of a condition of his own promissory duty thereby eliminates it as such a condition. *He will not be permitted to take advantage of his own wrong*." *Spanos v. Skouras Theatres Corp.*, 364 F.2d 161, 169 (2d Cir. 1966) (emphasis added); *see also Ferguson*, 478 F. Supp. 2d at 476, 80) (denying summary judgment where evidence showed that defendant's misleading statements precluded plaintiff from making timely objections). Moreover, the implied covenant of good faith and fair dealing requires that parties "will not intentionally and purposely do anything to prevent the other party from

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1425 Fourth Avenue Suite 800
Seattle, Washington 98101-2272
(206) 749-0500

carrying out the agreement on his part." *Kader v. Paper Software Inc.*, 111 F.3d 337, 342 (2d Cir. 1997) (internal quotation marks omitted).

Here, Coalview's bad-faith actions prevented TransAlta from satisfying the requirement that it dispute invoices within 30 days. On the face of the invoices, the charges aligned with the measurements. Thus, the invoices concealed the bad-faith and fraudulent practices that went into the underlying data collection and calculations. TransAlta raised the dispute at issue here only after it became apparent from extrinsic evidence—TransAlta's observation and measurement of Pond 3C—that something was amiss. By skewing the measurements and thereby concealing its breaching conduct, Coalview prevented TransAlta from timely objecting to the invoices under MSA Article 7.04. As in *Spanos*, to grant Coalview's motion would permit Coalview to take advantage of its own wrong. The Court should deny Coalview's motion for summary judgment on this basis as well.

4. Even if MSA Article 7.04 clearly and unambiguously barred invoice disputes more than 30 days old, it would not preclude TransAlta's contract claims here

TransAlta's breach of contract claim is not a simple dispute over the accuracy of invoices. Rather, TransAlta's breach claim is rooted in allegations that Coalview failed in its obligations to carry out the project in a commercially reasonable fashion and in good faith. (ECF No. 126, Counterclaim ¶¶ 30–37.) The inflated invoices are not the breach per se; they are the means by which the breach caused damages. Thus, MSA Article 7.04 does not govern the present dispute (just as Coalview never argued that it controlled the prior billing dispute, based on the faulty algorithm).

For this reason, Coalview's reliance on *Frontier Communications of the W., Inc. v. N. Am. Long Distance Corp.*, 2001 WL 1397856 (W.D.N.Y. Oct. 24, 2001), is misplaced. That case was a simple billing dispute, with no counterclaim by the defendant that the plaintiff had breached its contract. There, the plaintiff sued for unpaid invoices after defendant withheld payment, and the defendant asserted—as an affirmative defense—that the plaintiff had billed at higher rates than promised. *Id.* at 1–2. Because the parties' contract required defendant to pay

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1425 Fourth Avenue Suite 800
Seattle, Washington 98101-2272
(206) 749-0500

invoices before disputing them, the court ruled that the defendant's affirmative defense was barred. Additionally, the contract at issue in *Frontier* required the defendant to dispute the invoice within 60 days or else "irrevocably waive" the challenge—thereby satisfying *Hurlbut's* requirement for express language limiting legal remedies.

B. TransAlta's Claim for Breach of the Covenant of Good Faith and Fair Dealing is Permitted under New York Law

New York law recognizes that a covenant of good faith and fair dealing inheres in every contract. *Dalton v. Educational Testing Service*, 87 N.Y.2d 384, 389 (1995). This covenant encompasses "any promises which a reasonable person in the position of the promisee would be justified in understanding were included." *Rowe v. Great Atl. & Pac. Tea Co.*, 46 N.Y.2d 62, 69 (1978). In carrying out one's performance, then, "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Kirke La Shelle Co. v. Armstrong Co.*, 263 N.Y. 79, 87 (1933). Thus the covenant provides protection against conduct that, while not expressly prohibited by the terms of the parties' contract, is nevertheless inconsistent with proper performance of the breaching party's obligations.

This distinction is illustrated in *Dalton v Educational Testing Service*, 87 N.Y.2d 384 (1995). There, the defendant testing service ("ETS") rejected one of the plaintiff's SAT scores based on a large discrepancy with his score on a prior test and the conclusion of a handwriting expert that the two tests were not completed by the same person. *Id.* at 387. The plaintiff's contract with ETS allowed him to contest such a conclusion by submitting additional information, which he did. *Id.* at 388. But ETS deemed the information to be irrelevant and did not consider it or investigate further. *Id.* This failure to consider information the contract entitled the plaintiff to submit deprived him of the benefits of the agreement and thus was a breach of the duty of good faith and fair dealing. *Id.* at 389, 93.

By contrast, in *Ion Audio, LLC v. Bed, Bath & Beyond, Inc.*, 2019 WL 1494398 (S.D.N.Y. April 2, 2019) (on which Coalview relies), the contract between the plaintiff supplier

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1425 Fourth Avenue Suite 800
Seattle, Washington 98101-2272
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and defendant retailer set forth in detail how pricing and payment would be determined, addressing such things as volume rebates, return credits, payment holds, and early pay discounts. The litigation was about interpreting the terms of various agreements, addenda, and correspondence and calculating the proper payment amount. And the plaintiff's good-faith-and-fair-dealing claims parroted its contact claims, merely tacking on the conclusory allegation that the defendant "conceal[ed] material information, deliberately miscalculat[ed] set formulas and misrepresent[ed] facts." *Id.* at *10–*11.

Here, the parties' agreements provided, among other things, that Coalview would weigh the WCS removed from the pond using a mass flow meter and density gauge and use those measurements for purposes of invoicing. (*See* ECF No. 157, Ex. B (Processing Agreement) Arts. 5.01, 5.02 & 5.04.) The agreement does not, however, expressly prohibit Coalview from taking measurements so as to skew the results or tampering with or failing to calibrate the density meter. Such actions constitute bad faith conduct that goes beyond a mere breach and deprives TransAlta of the right to receive the fruits of the contract. Among other things, as discussed above in part III.A.3, this deceptive conduct deprived TransAlta of the ability to make informed, timely objections to Coalview's invoices—a right that it had under the parties' agreements.[8] Taking these facts in the light most favorable to TransAlta, and drawing all inferences in TransAlta's favor, the Court should deny Coalview summary judgment on TransAlta's good-faith-and-fair-dealing claim.

C. TransAlta's Fraud Claim is Permitted under Applicable Washington Law

Ever since TransAlta brought its motion for leave to amend back in early April of this year, Coalview has asserted without justification or meaningful argument that New York law controls the entirety of the parties' relationship and, therefore, any claims that may arise

[8] Coalview's argument that TransAlta's good-faith-and-fair-dealing claim seeks to impose obligations inconsistent with the terms of the agreement because it "ignores" the alleged 30-day limitation period in MSA Article 7.04 is misguided for two reasons. First, it assumes that there is such a limitation, which is wrong. (*See supra* part III.A.1.) Second, expecting Coalview to act in good faith would in no way be inconsistent with a 30-day limitation period for objecting to invoices, even if one existed. Following Coalview's logic, no breach by Coalview—no matter how egregious—could be the basis for any cause of action unless discovered and objected to within 30 days of its most recent invoice.

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(206) 749-0500

between the parties—whether in contract or not. This argument was unconvincing when presented in Coalview's opposition to TransAlta's motion for leave to amend (which the Court granted); it was unconvincing when presented in Coalview's motion to dismiss TransAlta's fraud claim (which the Court denied); and it has not improved with age or repetition.

The fatal flaw in Coalview's argument is that it is built upon the unsupported premise that New York law applies to TransAlta's tort claims.[9] TransAlta requests that the Court refer to its opposition to Coalview's motion to dismiss, which addressed these choice-of-law issues in detail (*see* ECF No. 141, at 4–9), but provides a brief review here.

1. Under the terms of the Master Services Agreement, New York Law does not apply to tort claims

A contractual choice-of-law provision applies only to contract claims, not to tort claims such as fraud. This is true under both Washington law and New York law. *J & J Celcom v. AT&T Wireless Servs., Inc.*, 215 F. App'x 616, 619 (9th Cir. 2006); *Lazard Freres & Co. v. Protective Life Ins. Co.*, 108 F.3d 1531, 1540 (2d Cir. 1997). While parties can expressly agree otherwise, a choice-of-law provision stating only that "this agreement shall be governed by and construed in accordance with the laws of [a given state]" extends only to contract claims. *See Carideo v. Dell, Inc.*, 706 F. Supp. 2d 1122, 1126 (W.D. Wash. 2010); *PetEdge, Inc. v. Garg*, 234 F. Supp.3d 477, 486 n.4 (S.D.N.Y. 2017).

Here, MSA Article 20.01 reads, in its entirety: "This Agreement shall be governed by and construed in accordance with the laws in the State of New York." Thus TransAlta's fraud claim is not subject to the contractual choice-of-law provision, and instead is subject to ordinary choice-of-law principles.

[9] As TransAlta has noted before, the entirety of Coalview's efforts at grappling with this critical threshold issue are contained in a footnote, appearing now in several of its briefs, stating in its entirety that "New York law governs the parties' dispute. MSA, ¶20.01." (*See*, *e.g.*, ECF No. 132, at 5, n.1.)

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2. Under ordinary choice-of-law principles, TransAlta's fraud claim is governed by Washington law

In the absence of an applicable choice-of-law provision in the parties' contract, federal courts sitting in diversity apply the choice-of-law rules of the forum state. *Love v. Associated Newspapers, Ltd.*, 611 F.3d 601, 610 (9th Cir. 2010). Under Washington law, courts will only engage in a choice-of-law analysis where there is "an actual conflict between the laws or interests of Washington and the laws or interests of another state." *Coneff v. AT&T Corp.*, 673 F.3d 1155, 1161 (9th Cir. 2012) (citing *Erwin v. Cotter Health Ctrs.*, 161 Wn.2d 676 (2007)).

Such a conflict arguably exists here: as Coalview repeatedly has pointed out, under New York's independent-duty doctrine, fraud claims generally are subsumed within a claim for breach of contract. *See generally J.M. Builders & Associates, Inc. v. Lindner*, 889 N.Y.S.2d 60, 63 (2009). In contrast, Washington law explicitly recognizes that there is "an independent duty not to engage in fraud or negligently misrepresent facts that exists separately from the terms of [a] contract." *Superwood Co., Ltd. v. Slam Brands, Inc.*, 2013 WL 4401830 (W.D. Wash. Aug. 15, 2013) (denying summary judgment) (citing *Elcon Construction, Inc. v. Eastern Washington University*, 174 Wn.2d 157, 165–66 (2012)).

Where a conflict of laws exists, Washington courts apply the most-significant-relationship test to determine which state's law to apply. *Rice v. Dow Chem. Co.*, 124 Wn.2d 205, 213 (1994) (citing Restatement (Second) of Conflict of Laws § 145 (1971)). This test considers (a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship between the parties is centered. *Bryant v. Wyeth*, 879 F. Supp. 2d 1214, 1220 (W.D. Wash. 2012). Applying this test to the circumstances of the present case, it is clear that Washington has the most significant relationship to the relevant events, and therefore Washington law applies. (*See* ECF No. 141, at 7–8.) Indeed, other than the choice-of-law provision in the MSA, there is no nexus between the parties, their relationship, or their conduct, and New York.

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Thus, under applicable Washington law, TransAlta's fraud claim is not barred by the independent-duty doctrine, and Coalview's motion for summary judgment must fail as a matter of law.

3. TransAlta had the right to rely on Coalview's statements

A party is entitled to rely on a positive, distinct, and definite representation and need not make further inquiry concerning the particular facts involved. *Bite Tech Inc. v. X2 Impact, Inc.*, 2012 WL 13018749, at *3 (W.D. Wash. Dec. 21, 2012) (citing *Douglas Northwest, Inc. v. Bill O'Brien & Sons Constr., Inc.*, 64 Wn. App. 661, 679 (1992)). This rule applies where misrepresentations are made to induce conduct, the misrepresentations succeed in inducing conduct, and the complaining party was actually misled by the misrepresentations. *Id.* (citing *Jenness v. Moses Lake Dev. Co.*, 39 Wn.2d 151, 159 (1951)). "[I]t is immaterial that the means of knowledge are open to the complaining party, or easily available to him, and that he may ascertain the truth by proper inquiry or investigation." *Id.* In particular, Washington has a strong policy of supporting a plaintiff who relies on misrepresentations made by a vendor. *See Gordon v. Hillman*, 91 Wn. 490, 495 (1916), *aff'd*, 95 Wash. 699 (1917) ("The fraudulent vendor cannot escape from liability by asking the law to applaud his fraud and condemn his victim."). For these reasons, the argument that TransAlta should not have trusted Coalview's measurements and representations is meritless as a matter of law.

Moreover, as matter of fact, TransAlta's reliance on Coalview's measurements was entirely reasonable. Throughout the course of the parties' relationship, TransAlta has made efforts to ensure that Coalview was meeting its obligations. This included direct inquiries as to the methods and practices involved with Coalview's measurement of removed slurry. During the 2016 dispute, Coalview made numerous assertions about how it would improve its practices going forward, thereby preventing a repeat of the circumstances that led to that dispute. (Johnson Decl. Ex. H.) Thus, in December of 2016, to ensure accurate measurement and invoicing going forward, Coalview purchased for Coalview a pair of Ronan nuclear density meters. (*Id.* ¶ 30.) TransAlta believed that, by assisting Coalview in this manner, it had taken

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Seattle, Washington 98101-2272
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commercially reasonable steps to ensure accurate measurements going forward, and that therefore TransAlta did not need to engage in parallel contemporaneous measurement of WCS. (*Id.* ¶ 30.)

Not only that, but TransAlta did in fact measure the amount of WCS removed by Coalview—more than once. Over the life of the project, TransAlta has carried out several surveys of Pond 3C. (*Id.* ¶ 6.) It was one such survey that led to the discovery of Coalview's underperformance in 2016, and a survey in March 2018 led to the investigation which precipitated the present dispute. (*Id.* ¶¶ 3–7, 33.) Indeed, had TransAlta not carried out measurements of Coalview's work, TransAlta would have no measurement of its damages in this case.

Further, it would not have been reasonable for TransAlta to have installed its own parallel measurement system. Such an effort would have been duplicative of the efforts TransAlta made in helping Coalview obtain and operate its own measurement system, as once installed and calibrated, Coalview's measuring equipment should have been reliable for several years unless tampered with. (*Id.* ¶ 32.) It was not until the outset of this dispute that TransAlta learned that Coalview had been deliberately tampering with the Ronan meter, as well as fabricating Marcy scale measurements—the impetus for TransAlta's fraud claim. (*Id.* ¶ 33.)

At the very least, whether TransAlta reasonably relied on Coalview's false statements raises genuine issues of material fact, including issues regarding what TransAlta actually did do and the feasibility of doing what it did not do. Taking the above facts as true, and drawing all reasonable inferences in TransAlta's favor, these issues preclude summary judgment in Coalview's favor. *See Aventa Learning, Inc. v. K12, Inc.*, 830 F. Supp. 2d 1083, 1100 (W.D. Wash. 2011) (denying summary judgment).

Coalview's only authority to the contrary, *Breco Envtl. Contractors, Inc. v. Town of Smithtown*, 762 N.Y.S.2d 822, 823 (2003), is in apposite. There, the defendant hired the plaintiff to cap its landfill by emplacing soil over the landfill material. Before beginning work, the plaintiff informed the defendant that the plaintiff's estimates regarding the amount of soil

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1425 Fourth Avenue Suite 800
Seattle, Washington 98101-2272
(206) 749-0500

required were low and submitted an independent higher estimate. At the end of the project, after the plaintiff submitted invoices for more soil than defendant's estimates had called for, the defendants refused to pay. Denying defendant's motion for leave to amend its counterclaim to add a count for fraud, the court held that the defendant could not have not reasonably relied upon the plaintiff's statements because (a) the defendant had been informed by the plaintiff that completing the job would require more soil than defendant's estimates called for, and (b) the defendant could have devised a method of monitoring the quantity of soil actually delivered. *Id.* But in *Breco*, the defendant never took ***any*** measurements—it simply relied upon its initial estimates, alleged that the plaintiff had billed it for emplacing far more soil than those estimates called for, and withheld payment. That is not the case here.

Breco is inapplicable for a number of reasons. First, as discussed above, *Breco* is inapposite on its facts. Second, *Breco* relies upon New York law, whereas Washington law applies to TransAlta's fraud claim and recognizes TransAlta's right to rely on Coalview's statements. *See Jenness*, 39 Wn.2d at 159 ("It is immaterial that the means of knowledge are open to the complaining party… and that he may ascertain the truth by proper inquiry or investigation.") Third, *Breco* did not involve a motion for summary judgment but instead concerned the defendant's motion for leave to amend its counterclaim to add a count for fraud. And finally, the court's denial of leave to amend in *Breco* cannot be reduced to a simple ruling that the defendant had no right to rely on the plaintiff's representations; the court also noted that the defendant's fraud count was duplicative of its breach of contract claim—a claim that was not challenged or addressed by the court's opinion (and would have a different result under applicable Washington law).

Thus, Coalview's argument that TransAlta should not have trusted is contrary to Washington law regarding fraud and, in any event, raises genuine issues of material fact.

SAVITT BRUCE & WILLEY LLP
1425 Fourth Avenue Suite 800
Seattle, Washington 98101-2272
(206) 749-0500

IV. CONCLUSION

For the foregoing reasons, the Court should deny Coalview's Motion for Summary Judgment and enter summary judgment in TransAlta's favor that MSA Article 7.04 does not bar its claims in this case.

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SAVITT BRUCE & WILLEY LLP

By *s/Miles A. Yanick*

Miles A. Yanick, WSBA #26603
Duncan E. Manville, WSBA #30304
Sarah Gohmann Bigelow, WSBA #43634
Jacob P. Freeman, WSBA #54123
1425 Fourth Avenue Suite 800
Seattle, Washington 98101-2272
Telephone: 206.749.0500
Facsimile: 206.749.0600
Email: myanick@sbwLLP.com
dmanville@sbwLLP.com
sgohmannbigelow@sbwLLP.com
jfreeman@sbwLLP.com

Attorneys for Defendants TransAlta Centralia Mining LLC and TransAlta Corporation

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document was filed electronically with the Court and thus served simultaneously upon all counsel of record, this 29th day of July, 2019.

Nate Garberich

SAVITT BRUCE & WILLEY LLP
1425 Fourth Avenue Suite 800
Seattle, Washington 98101-2272
(206) 749-0500